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Proposed Amendments to the Federal Rules of Civil Procedure†

BY G. WALTER BOWMAN*

The Federal Rules of Civil Procedure have been in effect since September 16, 1938, and during this six-year period we have become familiar with them and can say that they are a tremendous success, and their success is a fine tribute to judges of the federal courts and to the federal bar; their worth has been recognized and has served as a model for state procedure, and many states, including Colorado, have adopted Rules of Civil Procedure, in place of outmoded procedures.

The aim of the Federal Rules is announced in Rule I. "They shall be construed to secure just, speedy and inexpensive determination of every action."

The underlying thought of the drafters of these rules was that they be simple and easily understood; however, during the time that has elapsed, we find that lawyers were not accustomed to rules that were simple and easily understood, and that they renewed their study of the law, and as a result the federal judges have handed down numerous decisions on the rules.

Our experience with the rules now shows that they need some clarification, and certain amendments are necessary to this end.

The Advisory Committe has prepared a preliminary draft of proposed amendments to the Rules, which has been distributed to the bench and bar with a request for criticism and suggestions to be placed in their hands before December 15, 1944.

Rule 6 (b) Time.

Rule 6 (b) is a rule of general application giving wide discretion to the Court to enlarge time limits or revive them after they have expired. the only exception stated in the rule being a prohibition against enlarging the time specified in Rule 59, that is to make motions for new trial within ten days, and one against enlarging the time fixed by statute for taking an appeal, that is three months.[1]

It should also be noted that Rule 6 (b), itself, contains no limitation of time within which the court may exercise its discretion, and since the expiration of the term does not end its power, there is now no time limit on the exercise of its discretion under this rule.[2] Some other

†An address before Colorado Bar Association, October 13, 1944.

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[1]Section 230 Title 28 USC.

[2]Page 4 of Preliminary Draft of proposed Amendments to Rules of Civil Procedure for the District Courts of the U. S.

rules which contain time limits which may be set aside under this rule are:

Rules 25, 50(b) and (d), and 60(b).[3]

There is also Rule 73 (g), which makes provision for the court to extend the time for filing and docketing the record on appeal, if the order of extension is made before the expiration of forty days. One court in construing Rule 6 (b) held upon a motion made after the expiration of the forty-day period, that it could permit the docketing on a showing of excusable neglect, and the contrary has been held in other courts.[5]

Alternative 2.

This alternative would deny to the courts the right to enlarge the time, except to the extent specifically stated in Rules 25, 60 (b) and 73 (g). It would remove the present prohibition against extending the time limits specified in subdivision (b) and (d) of Rule 59, that is to make motions for new trials, and allow such motions, as well as those under 50 (b), that is for judgment notwithstanding the verdict, and under 52 (b) that is for the amendment of findings and modification or vacation of an existing judgment, to be made at any time without time limit. The argument for this alternative is that the courts should have the widest discretion, on a proper showing, at any time to relieve a party from an unjust judgment, and that such relief is more important than fixing a definite time for ending the litigation and producing finality of judgments.[6]

Alternative 3.

This goes further than alternative 2, and would prevent the court from enlarging the time except to the extent and under the conditions stated in Rules 25, 50 (b), 52 (b), 59 (b) and (d), 60 (b) and 73 (g).

The main problem here is one directly affecting the finality of judgments,[7] and the proposition that where there is a specific rule and a general rule, which should govern? This can be determined by the adoption of either of Alternatives 2 or 3, the one adopted depending on the extent to which you desire to limit the scope of Rule 6 (b).

Rule 12, Pleadings.

There are three alernatives presented for consideration.

Alternative 1.

(a) First some minor changes are made and all references to bill of particulars is deleted, and a new sentence has been added, "The time for a party to plead or otherwise move under this rule may be

[3]Page 5 of Preliminary Draft of Proposed Amendments.

[5]Mutual Benefit Health & Accident Ass'n vs Snyder, (6 C. A. 6th, 1940) 109; Fed (2nd) 469, and in Burke vs Canfield-(App. D. C. 1940), 111 Fed (2nd) 526.

[6]Pre. Draft of Proposed Amendments to Rules of Civ. Pro. page 8.

[7]Pre. Draft of Proposed Amendments to Rules of Civ. Pro. Page 3.

extended by a written stipulation of the parties without approval of the court." This sentence was added to avoid the results of a decision of the Court,[8] wherein it was held that the parties may not extend the time for answer, or for the performance of other acts under the rules, by a stipulation unapproved by the Court. Such a stipulation is not binding on the court or the parties; the only extension of time is found in Rule 6 (b).

(b) adds the defense "(7), failure to join an indispensable party" cures an omisison in the rules, which were heretofore silent as to the mode of raising such failure.[9]

e. Again in this subdivision all reference to bill of particulars has been eliminated, and there has been added the phrase, "where the pleading is so vague or ambiguous that the party cannot frame an answer or a responsive pleading thereto." The motion provided for is confined to one or more definite statements, to be obtained only in extreme cases where the movant cannot frame an answer or a reply to the pleadings in question. With respect to preparation for trial, the party is properly relegated to the various methods of examination and discovery provided in the rules for that purpose.[10]

Rule 12 (e) as originally drawn has been the subject of more judicial ruling than any other part of the rules, and has been much criticized by commentators, judges, and members of the bar.

It is clear that the framers of the rules did not intend that the compliance with Rule 8 that the pleadings be short and plain, would subject a plaintiff to a motion for a bill of particulars under Rule 12 (e), therefore the bench, bar and commentators have recommended the absolute abolishment of Rule 12 (e) to simplify procedure and to facilitate the determination of litigation.[11]

Perhaps the advisory committee felt that lawyers were so accustomed to getting further information by bill of particulars that they thought the modification as suggested would remedy the situation better than the complete abolishment of the rule. I believe it is a step in the right direction, and not so drastic as abolishment thereof.

(h) adds the phrase, "except (2) that the defense of failure to prove a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to prove a legal defense to a claim may also be made at the trial on the merits."

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[8]Orange Theatre Corp. vs Rayherstz Amusement Co. (CCA 3d 1942 130, Fed (2nd) 185.

[9]Pre-Draft of Proposed Amendments to Rules—Page 15. See Commentary—Manner of Raising Objections of Non-joinder of Indispensable Party (1940) 2nd Fed. Rules Serv. 658 and (1942) 5 Fed. Rules Serv. 820. In one case—United States vs. Metropolitan Life Insurance Co. (E. D. Pa. 1941) 36 F Supp. 399,—the failure to join an indispensable party was raised under Rule 12 (c).

[10]Pre. Draft of Proposed Amendments to Rules—page 16.

[11]Pre. Draft of Proposed Amendments to Rules—page 16.

The revision of subdivision (h) is in line with the changes made in subdivision (g) and the language of the rule has been revised to indicate its intent more clearly. By the amendment all available defenses and objections to pleadings not properly presented are waived, with the exception of matters expressly enumerated. The defenses stated in clause (2) go to the very heart of the action and its succesful prosecution, and thus may be raised at the trial. The addition in clause (3) of the phrase relating to indispensable parties is one of necessity.[12]

Alternative 2.

This alternative provides for the disposition of certain motions as a motion for a summary judgment and to be disposed of as provided in Rule 56. Since we still have Rule 56, I believe that this alternative should be rejected since it would tend to confuse the pleader as to which rule would apply and the best that can be said for this alternative is that perhaps it would save the filing of a second motion.

Alternative 3.

Accomplishes much the same result as Alternative 2.[13]

Rule 56 (c)

The amendment of Rule 56 (c) resolves a doubt as to the exact meaning of the deleted phrase "except as to the amount of damages," by adding the sentence, "A summary judgment may be given on the issue of liability alone as distinguished from the amount of damages." It is intended to make it clear that the right to summary recovery may be determined by preliminary order and the precise amount of the recovery or damages be left for trial.[14]

To Rule 56 an alternative rule has been proposed to be considered with alternative 3 of Rule 12 in the event that the same is adopted.

Rule 71 A

Rule 71 A. is a new rule inserted with regard to the procedure in the condemnation of property, for public use. This is an attempt to harmonize the procedure which has varied in the many states. C. V. Marmaduke, Jr., Assistant United States Attorney for the District of Colorado, who has handled the greater portion of the condemnations in this District, suggests among other changes the following:

> Line 47, to and including line 53, Page 81, Rule 71-A provides: "* * * The defendants shall appear and defend, and that in case of failure to do so, judgment by default will be entered and that thereafter they cannot raise any question of the plaintiff's right to condemn or as to the value of the property and can be heard only as to their rights to share in the distribution of the award. * * *"

[12]Pre. Draft of Proposed Amendments to Rules—Page 17.
[13]Pre. Draft of Proposed Amendments to Rules—Page 19.
[14]3 Moore's Federal Practice—page 3186. Pre. Draft of Proposed Amendments to Rules—page 67.

The Government is not at that point in the case prepared to introduce evidence of value and the defendant would probably not be so prepared.

The Colorado statute provides that just compensation shall be determined by a jury or by commissioners. A jury cannot be empaneled or commissioners appointed at this point in the procedure. The effect would be to deny property owners the right to introduce testimony at a hearing thereafter held and the only testimony that could be received would be the government's evidence of value. I doubt if such part of the rule would be constitutional, as it requires the defendant's day in court to be at the time when the Colorado procedure does not provide for hearing on value.

Line 92 to 95, Page 82, of the same rule provides: " * * * Copies of the notice shall also be posted in a conspicuous place on each lot, parcel or tract of the 'unknown owners' * * * "

Unknown owners should apply to persons interested in tracts the record title of which is ascertainable. In many instances, the property has been subdivided but there is no actual construction of roads, alleys, streets, and no monuments within the area. Therefore, it would be impossible to post o notice on a particular lot or tract with any degree of accuracy. Also, never in any condemnation suit filed in Colorado has there been a lot or tract owned by an unknown owner. Abstracts always show the name of the owner. In one case which involved 212 acres there were approximately 800 different owners, which would have required notices being posted on 800 different lots, not one of which lots could have been located without a survey.

Rule 73.

Which presents two alternatives. To Rule 73 (a) has been added the following sentence, "After notice of appeal has been filed but before the appeal has been docketed as provided in Rule 73 (g), the District Court may dismiss an appeal on stipulation of the parties or upon motion of the appellant."

By this amendment the district court is given express power to dismiss an appeal on stipulation or upon the motion of the appellant after the notice of appeal has been filed but before the appeal is docketed in the circuit court. This makes it possible to avoid the useless formality and expense of docketing the appeal and then dismissing it in the appellate court, as when the parties have agreed to a settlement and wish to protect their rights.[15]

[15]Pre. Draft of Proposed Amendments to Rules—Page 95. Heretofore, the general view has been that once notice of appeal is filed the district court has no authority to proceed further in the matter, except in aid of the appal or under Rule 60(a) until it has received the mandate of the appellate court. Miller vs. U.S.—114 Fed. (2nd) 267; Fiske vs. Wallace 115 Fed. (2nd) 1003 cert. den. 314 U.S. 663; Schram vs. Saftey Inv. Co. 45 F. Supp. 636. In re Chinn Ben Shin—4 Fed. Rules Serv. 73 a 42;

Alternative 2.

Alternative 2 adds in addition to the sentence above mentioned in the first alternative a second paragraph, "An appeal to a circuit court of appeals shall be taken within thirty days after written notice by a party to the aggrieved party of the entry of the judgment complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then forty days from such entry."

This would reduce the time for filing notice of appeal from the statutory period of three months[16] to thirty days if notice is given, or to forty days if notice is not given. It is an attempt to unify the civil rule on appeal with Section 25 a of the Bankruptcy Act, by the adoption of Section 25 (a) of the Bankruptcy Act, by the adoption of Section 25 (a) as a part of the civil rules. The general order in bankruptcy[17] provides that appeals in bankruptcy matters shall be regulated by the rules governing appeals in civil actions, including the rules of civil procedure. Since the method of appeal in bankruptcy matters needs no clarification, I do not believe that this should become the basis of reducing the time for appeal in civil cases. It is apparent that the time for appeal should be shorter in bankruptcy matters in view of the fact that it is in the nature of a second appeal, it having been previously heard by the court on a record and petition for review from the referee in bankruptcy.

Rule 75—Record on Appeal to a Circuit Court of Appeals

(a) This subdivision is amended by the insertion of, "unless the appellee has already served and filed a designation," and the insertion of, "If the appellee files the original designation, the parties shall proceed under subdivisions (b) and (d) of this rule as if the appellee were the appellant," giving the appellee the right to take the initiative in filing the designation of matters to be included in the record for transmission to the appellate court, where an appellant is slow or fails to act promptly.[18]

(b) and (g). The changes in the subdivision are designed to eliminate the necessity for a second copy of the transcript, which is a saving in the expense of perfecting an appeal.

(d) The addition of the phrase, "No assignment of errors need by incorporated in the record on appeal * *" only emphasizes the fact that assignment of errors are not to be required or included in the record on appeal, and it also eliminates any necessity for cross-assignments of error.[19]

[16]Sec. 230 Title 28 U.S.C.
[17]General Order in Bankruptcy No. 36.
[18]Pre. Draft of Proposed Amendments to Civil Rules—Page 103.
[19]Pre. Draft of Proposed Amendments to Civil Rules—Page 103.

Rule 77—District Courts and Clerks

(d) Amendment proposed is, "The time to appeal shall start from the entry of a judgment, and for this purpose all parties are charged with knowledge or the entry. Notification of the entry of an order or judgment shall be given immediately by the clerk by mail in the manner provided for in Rule 5 upon every party affected by the order or judgment who is not in default for failure to appear, and he should make a note in the docket of the mailing."

At the end of this sentence I would suggest the addition of the phrase, "except when said judgment is entered on the stipulation of the parties, then notice shall not be given."

The reason for my suggested amendment is obvious, since the rule makes no exception, the clerk would have to send the notice, although the order was entered on stipulation with all parties present.

The amendment proposed by the Advisory Committee makes it clear that for the purpose of appeal it is incumbent upon all parties to inform themselves of the entry of a judgment. Thus notification by the clerk is merely for the convenience of litigants, and lack of notification has no operative effect upon the time for appeal, nor does it authorize the court to relieve a party from the consequences of a lack of knowledge of the entry.[20] This amendment avoids such situations as the one arising in Hill vs. Haws (1944) 320 U.S. 520.

Rule 81.

To Rule 81 (a) 2, I would suggest the addition of a phrase, "including proceedings under the Food and Drugs Act."[21]

This would clarify this rule, since Rule 81 (a) 1 specifically provides, "These rules do not apply to proceedings in admiralty." Proceedings under the Food and Drugs Act are brought under admiralty practice, and are forfeitures of property for violation of a statute of the United States, and thereby are construed to come under the provisions of subdivision 2 of said Rule 81, which provides, "In the following proceedings appeals are governed by these rules, * * * and forfeiture of property for violation of a statute of the United States."

It has been held that food and drugs condemnation proceedings partake of both admiralty and law; the seizure is made under admiralty procedure, and is thereafter so conducted, unless an answer to the bill is filed, in which case the Federal Rules will apply[22] while in an admiralty case the court held that the Federal Rules of Civil Procedure do not

[20]Pre. Draft of Proposed Amendments to Civil Rules—Page 108.

[21]Title 21 U.S.C.—Food and Drugs Act.

[22]1943 Supp. of Moore's Federal Practice page 3427. In United States vs. 23 Bottles, etc. (D.Ore.) 3 D. J. Bull 18, 1 Fed. Rules Serv. 81 a 11, Case No. 1. See also Coffey vs. U.S. (1886) 117 U. S. 233; 443 Cans of Frozen Egg Products vs. U.S. 1912, 226 U.S. 172.

apply in admiralty, appellate jurisdiction in admiralty depends upon substantial compliance with general appeal statute.[23]

In conclusion it is my recommendation that a committee be appointed to study the proposed amendments to the Civil Rules, and that their recommendations be given to the Advisory Committee, with a resolution of approval of the Colorado Bar Association.

[23]Compania vs. Georgia Hardwood Lumber Co., (C.C.A. 5, 1944) 141 Fed. (2nd) 652 reversing F. Supp. 402.